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No. 85-1957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DANIEL A. BRUNO and PHILIP R. HERZIG,

Petitioners,

—against—

WESTERN PACIFIC RAILROAD COMPANY
and UNION PACIFIC CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

RESPONDENTS' BRIEF IN OPPOSITION

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Question Presented

Whether the Delaware Supreme Court correctly determined, in reliance upon the Interstate Commerce Act and the decision in *Schwabacher v. United States*, 334 U.S. 182 (1948), that approval by the Interstate Commerce Commission of the terms of a railroad merger as just and reasonable preempts appraisal rights under Delaware law and deprives Delaware courts of subject matter jurisdiction over an appraisal proceeding to determine the "fair value" of the stock of one of the railroads?

Parties

The named parties to the proceeding below are listed in the caption.[1]

1 A listing, pursuant to Rule 28.1, of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of respondents is provided in Appendix E, at 11a.

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WESTERN PACIFIC RAILROAD COMPANY
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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

The Western Pacific Railroad Company ("Western Pacific") and Union Pacific Corporation ("Union Pacific") submit this response to the petition for a writ of certiorari to review an order of the Delaware Supreme Court affirming the dismissal, for lack of subject matter jurisdiction, of petitioners' appraisal proceeding under Delaware law seeking the "fair value" of their former holdings of Western Pacific stock. The Delaware Supreme Court, affirming the Delaware Chancery Court and relying on this Court's holding in *Schwabacher v. United States*, 334 U.S. 182 (1948), held that the Interstate Commerce Commission's approval of the merger of Western Pacific into a Union Pacific subsidiary and its determination pursuant to the requirements of the Interstate Commerce Act that the merger terms and merger price were just and reasonable resulted in preemption of any state law appraisal proceeding.

Despite a variety of irrelevant arguments and accusations by petitioners, it is clear that *Schwabacher* disposes of this case

and, accordingly, that the decision below correctly held that the ICC's approval of the merger terms necessarily preempted state law appraisal rights and precluded jurisdiction of the Chancery Court over the appraisal proceeding.

Opinions Below

The unpublished Order of the Delaware Supreme Court is set forth as Appendix A to the Petition. The Opinion of the Delaware Chancery Court is reported at 498 A.2d 171 (Del. Ch. 1985) and is set forth as Appendix B to the Petition. The unpublished Order of the Chancery Court is set forth as Appendix C to the Petition.

Jurisdiction

The Order of the Supreme Court of Delaware was rendered on March 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Statutes Involved

The statutory provisions involved in this case are the Interstate Commerce Act, 49 U.S.C. §§ 11341, 11344, and the Delaware appraisal statute, Del. Code Ann. tit. 8, § 262. Section 11341 of the Interstate Commerce Act and section 262 of the Delaware corporations code are set forth as Appendices G and H to the Petition. The pertinent text of section 11344 is set forth as Appendix A, at 1a to 2a, to this Brief.

Statement of the Case

Petitioners' statement of the case is devoted in large measure to strident assertions that respondents breached an agreement not to object to a Delaware appraisal proceeding, thereby waiving the preemptive effect of the ICC's determination.

While respondents breached no agreement, the question of a breach is irrelevant to the jurisdictional issue.[2] The Interstate Commerce Act, as construed in *Schwabacher*, effectuates a preemption over state law appraisal rights and, as petitioners themselves conceded below (App. D at 10a), subject matter jurisdiction cannot be conferred upon state courts by action of the parties.

On January 23, 1980, Union Pacific (through a wholly owned subsidiary) commenced a non-hostile tender offer for shares of Western Pacific common stock at $20 per share in cash. The tender offer was made pursuant to a merger agreement between Western Pacific and Union Pacific. Western Pacific's board of directors recommended that stockholders accept the offer because the directors regarded the $20 per share price as fair.

The Offer to Purchase stated that its purpose was to acquire all of the Western Pacific shares and to merge the railroads, and noted the need for Interstate Commerce Commission approval. The Offer to Purchase advised of the possibility of federal preemption of dissenting stockholders' state appraisal rights pursuant to *Schwabacher*, and of Union Pacific's agreement not to object if shareholders demanded appraisal (Pet. at 5). A large majority of the outstanding shares of Western Pacific Class A common stock were tendered to Union Pacific and were transferred to a voting trust pending the ICC's determination of the applications for approval of the proposed merger.

Various minority shareholders of Western Pacific, including one of the named petitioners in this action, Daniel A. Bruno,

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2 Petitioners have commenced a related case in the U.S. District Court for the Southern District of New York making claims under both federal and state law for damages they allegedly incurred (apparently consisting of legal expenses plus interest on the $20 per share that they have delayed taking in order to pursue appraisal rights) due to the purported breach of respondents' agreement not to object to an appraisal proceeding, and they have moved for partial summary judgment on their breach of contract claim. *Bruno v. Cook*, 85 Civ. 0835 (S.D.N.Y. Jan. 28, 1986).

intervened in the ICC proceeding. They called to the attention of the ICC, and subsequently to the appellate courts, the issues concerning the value of Western Pacific stock that they later sought to litigate in their Delaware appraisal action, including their position that the merger price did not adequately reflect the value of Western Pacific real estate holdings. *Union Pacific Corp.*, 366 I.C.C. 459, 634 (1982), *aff'd sub nom.*, *Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1171, 1172 (1985).

On October 20, 1982, the ICC approved the merger. The ICC expressly recognized its responsibilities under *Schwabacher*, noting that "it is incumbent upon us to see that the interests of the minority stockholders are protected and that the overall proposal is just and reasonable to those stockholders, *Schwabacher v. United States*, 334 U.S. at 198, 201." *Union Pacific*, 366 I.C.C. at 635. After analyzing the facts, considering the arguments raised by dissenting minority shareholders, and discussing methods for valuing stock in an ongoing concern and the value of Western Pacific's real estate, the ICC concluded that "the terms of the UPRR-WPRR transaction are just and reasonable" and that the $20 per share price "is fair and reasonable." *Id.* at 632-638. The ICC's decision was affirmed on appeal and this Court denied petitions for a writ of certiorari. *Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1171 (1985).[3]

On May 2, 1983, a Proxy Statement was circulated to Western Pacific shareholders in connection with a meeting of shareholders to act on the merger. The Proxy Statement again advised of the preemptive effect of the ICC's determination on state appraisal proceedings. It also again advised that Union Pacific had agreed not to object if shareholders sought an

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3 In affirming the ICC, the Court of Appeals in no way relied on the existence of appraisal rights but rather affirmed the ICC's determination that the merger price was just and reasonable, including the ICC's methodology in valuing Western Pacific's real estate holdings. *Southern Pacific*, 736 F.2d at 726.

appraisal proceeding, but cautioned that a Delaware court could nevertheless determine on its own initiative that it lacked jurisdiction as a result of *Schwabacher.* The Proxy Statement advised:

> In *Schwabacher v. United States*, 334 U.S. 182 (1948), the United States Supreme Court, in construing the predecessors to Sections 11344 and 11346 of the Interstate Commerce Act, held that appraisal rights otherwise granted by state law are preempted in the case of acquisitions approved as just and reasonable by the ICC in accordance with applicable Federal law. Nevertheless, Union Pacific has agreed that it will not object if holders of Class A Common Stock not owned by Union Pacific or its affiliates demand appraisal of their Class A Common Stock under Delaware law. However, there can be no assurance that a Delaware court will not, on its own initiative, determine that *Schwabacher* denies it jurisdiction over an appraisal proceeding commenced in connection with the Merger in which case each dissenting shareholder shall receive $20 per share in accordance with the Agreement of Merger. In any such proceeding, Union Pacific would have the right to argue that the determination of the ICC that the terms of the Merger providing for the conversion of each share of Class A Common Stock into $20 in cash is just and reasonable should be given substantial weight by the Delaware courts.

May 2, 1983 Proxy Statement at 5.[4] On May 24, 1983, the stockholders meeting was held and the merger was approved.

After issuance of the Proxy Statement, Mr. Bruno, one of the petitioners here, petitioned the ICC to reopen and reconsider its approval of the merger terms, based on the information as to land values included in the Proxy Statement (*see*

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4 Petitioners' quotation of this portion of the Proxy Statement (Pet. at 10-11) eliminates the last two sentences of this paragraph, which expressly alerted dissenting shareholders that the Delaware courts might dismiss an appraisal proceeding.

App. B at 3a-4a).[5] The ICC denied the petition, ruling that the new land value allegations were not materially different from the allegations made prior to the ICC's original decision (App. B at 4a). Shortly after the ICC denied the petition to reopen, petitioners commenced the appraisal proceeding below.

In March, 1985 it became apparent that petitioners were not going to advise the Delaware Chancery Court of the jurisdictional provisions of the Interstate Commerce Act or of the holding of *Schwabacher* so that the court could be made aware of an issue of subject matter jurisdiction. Accordingly, counsel for respondents wrote a letter to the Chancery Court enclosing the relevant portion of the 1983 Proxy Statement and calling the court's attention to Union Pacific's position respecting the applicability of *Schwabacher* set forth in the Proxy Statement, informing the court of Union Pacific's agreement not to object to prosecution of the appraisal action on the basis of *Schwabacher*, and reaffirming that Union Pacific would not raise any such objection (App. C at 5a-6a). The Chancery Court directed the parties to brief the question of its jurisdiction (Pet. App. at A6). On August 9, 1985, the Chancery Court issued an opinion dismissing the appraisal proceeding for lack of subject matter jurisdiction (Pet. App. B). The Delaware Supreme Court affirmed on March 7, 1986 (Pet. App. A).

Union Pacific did not assert a jurisdictional defense in its answer to the petition in the appraisal proceeding or move to dismiss on jurisdictional grounds. Its counsel brought to the attention of the Chancery Court, pursuant to the obligation to inform the court of relevant authority, the existence of the agreement not to object to jurisdiction on the basis of a

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5 The information as to land values contained in the Proxy Statement was also brought to the attention of the D.C. Circuit during the appeal of the original ICC decision. Supplemental Brief of Petitioner Edward K. Wheeler at 2-4, May 27, 1983, *Wheeler v. ICC*, No. 82-2342 (D.C. Cir. 1983). That court thereafter affirmed the ICC's finding that the merger price was just and reasonable, *Southern Pacific Transportation Co.*, 736 F.2d at 726, and this court denied certiorari, 105 S. Ct. 1172 (1985).

decision of this Court which, if overlooked, could have made the appraisal trial a nullity and a waste of judicial resources. Notwithstanding the absence of any jurisdictional motion the Chancery Court decided to consider the jurisdictional issue and decided it adversely to petitioners. The Delaware Supreme Court affirmed. Petitioners took full advantage of the opportunity to argue in the Delaware courts, as they now argue here, that the Interstate Commerce Act and *Schwabacher* did not confer exclusive jurisdiction on the ICC in this case. Thus the only issue here is whether the Delaware courts properly determined that petitioners' arguments were without merit and that appraisal jurisdiction was lacking.

REASONS FOR DENYING THE PETITION

Petitioners' mistaken accusations of misrepresentations by respondents do not suffice to create subject matter jurisdiction in the Delaware courts over the appraisal proceeding below in the face of the provisions of the Interstate Commerce Act conferring exclusive jurisdiction on the ICC to determine whether the terms of a merger of interstate railroads are just and reasonable, the long-standing decision of this Court in *Schwabacher* confirming the preemptive effect of such ICC determinations on state law proceedings, and the refusal by Congress to overrule *Schwabacher* notwithstanding subsequent recodification of the relevant provisions of the Act. *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 54 U.S.L.W. 4520, 4523 (U.S. May 27, 1986). The decision of the Delaware Supreme Court was correct, and petitioners have shown no meritorious basis for the grant of certiorari.

Petitioners invoke several traditional grounds in support of their request for review—that the decision below decided an important issue incorrectly and in conflict with decisions of other courts, and that the Court recently granted certiorari in a case "raising virtually the identical issue." However, petitioners misstate the law and misconstrue other cases in their efforts to demonstrate that these grounds exist in this case. The decision

below faithfully follows this Court's decision in *Schwabacher* and is harmonious with the relevant lower court cases since *Schwabacher* was decided. Moreover, the allegedly identical case pending before the Court, *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *cert. granted*, 54 U.S.L.W. 3630 (U.S. March 24, 1986) (Nos. 85-792, 85-793), presents a different issue.

1. The Court Below Correctly Held That This Court's Decision In *Schwabacher* Requires ICC Preemption Of State Proceedings Involving Shareholder Rights

The Court held in *Schwabacher v. United States*, 334 U.S. 182 (1948), that state proceedings to allow additional shareholder compensation are preempted in the case of mergers—such as the merger of Western Pacific and Union Pacific—approved as just and reasonable by the ICC in accordance with the Interstate Commerce Act. In such matters, the Court stated, "The jurisdiction of the [ICC] . . . is made plenary and exclusive and independent of all other state or federal authority." 334 U.S. at 197.

Schwabacher involved an ICC order approving the terms of a railroad merger as just and reasonable but expressly leaving open the issue of the dissenting stockholders' rights to additional compensation under state law, to be resolved through agreement of the parties or litigation under state law. The Court reversed the ICC's determination that the stockholders' state law claims could survive, concluding that:

> It appears to us inconsistent with the Interstate Commerce Act for the Commission to leave claims growing out of the capital structure of one of the constituent companies to be added to the obligations of the surviving carrier, contingent upon the decision of some other tribunal or agreement of the parties themselves.

334 U.S. at 197.

The essence of petitioners' arguments is that *Schwabacher* is wrong, not that *Schwabacher* does not control this case. Yet,

petitioners offer no grounds for challenging the soundness of the holding in *Schwabacher*, and none exists. *Schwabacher* has been the landmark decision governing the effect of ICC-approved mergers on shareholders' rights for almost 40 years. During that period, although obviously aware of the decision, Congress recodified the pertinent provisions of the Interstate Commerce Act (now 49 U.S.C. §§ 11341, 11344, formerly 49 U.S.C. § 5(2), (11)) but declined to overrule *Schwabacher* or to make any substantive changes in the relevant statutory provisions, a fact petitioners expressly conceded during the briefing below.[6] Such action by Congress is evidence of its approval of this Court's construction of the Act. *Cf. Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 54 U.S.L.W. 4520, 4523 (U.S. May 27, 1986) (even if a decision of the Court represented unwise policy, it "remains true that Congress must be presumed to have been fully cognizant of [the decision's] interpretation of the statutory scheme . . . and that Congress did not see fit to change it when Congress carefully reexamined this area of the law . . ."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982).

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6 Congress expressly provided when it enacted the recodification in 1978 that the recodification "may not be construed as making a substantive change in the laws replaced." Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466 (1978). The 1978 Revision Notes explain the drafting reasons for certain nonsubstantive changes in language. First, former § 5(11) of the Interstate Commerce Act provided that the ICC's authority was "exclusive and plenary" and that the merging entities were "relieved from the operation of the antitrust laws and all other restraints, limitations, and prohibitions of law . . . ," while the recodified § 11341(a) provides that the ICC's jurisdiction is "exclusive" and that the merging entities are "exempt" from antitrust and all other laws. According to the Revision Notes, these changes were made "for clarity." 49 U.S.C.A. § 11341, Historical and Revision Notes at 533 (1986). Second, former § 5(2)(b) of the Act provided for ICC approval of a merger "upon the terms and conditions . . . found to be just and reasonable . . . ," while the recodified § 11344(c) provides that the ICC shall approve a transaction "when it finds the transaction is consistent with the public interest." The Revision Notes explain that the words "just and reasonable" were omitted in the recodification "for clarity" and in view of the requirement that the transaction be "consistent with the public interest." 49 U.S.C.A. § 11344, Historical and Revision Notes at 544 (1986).

Although the court below found the holding in *Schwabacher* to be controlling here, petitioners address the case primarily by ignoring it. They devote page after page of legal argument to their own interpretation of the Interstate Commerce Act and to two cases that have nothing to do with the effect of the ICC's approval of a merger upon shareholders' rights. Their own interpretation of the Act is that it created a mere exemption from state law that exists only if specifically invoked by the ICC as necessary to carry out the merger. They assert further that the exemption can be waived by the parties, and that it was waived by Union Pacific's agreement not to object to appraisal jurisdiction. Petitioners' efforts thus to avoid *Schwabacher* were correctly rejected by the Delaware Supreme Court as having "no merit" (Pet. App. at A2).

First, *Schwabacher* contradicts petitioners' reading of the Interstate Commerce Act as creating an exemption that only comes into effect if the ICC specifically determines that such an exemption is necessary. It is clear from *Schwabacher* that the statutory exemption follows perforce from the ICC's approval of the merger terms without the need for specific ICC findings of necessity. Indeed, in *Schwabacher* the ICC had not only failed to invoke an exemption as necessary to carry out the merger, but it had expressly found that allowing dissenting stockholders to pursue state law remedies would *not* impair the railroad's performance—in effect concluding that an exemption was *not* necessary. 334 U.S. at 197. Under petitioners' interpretation of the Act, shareholders' state law rights would therefore have survived. Nonetheless, the Court held that preemption resulted from the Act itself, notwithstanding the ICC's contrary intent, and that it would be "inconsistent with the Interstate Commerce Act" to allow the dissenting stockholders' claims to survive. *Id.*

Petitioners erroneously and without citation claim that the ICC here approved, as part of the merger terms, an "agreement to afford" appraisal rights to minority shareholders (Pet. at 6). In addition to the fact that respondents did not agree "to afford" appraisal rights, nowhere in the ICC's extensive opin-

ion does it approve or even refer to any such agreement. To the contrary, the ICC expressly recognized that "it is incumbent upon us to see that the interests of the minority stockholders are protected and that the overall proposal is just and reasonable to those stockholders, *Schwabacher v. United States*, 334 U.S. at 198, 201." *Union Pacific*, 336 I.C.C. at 635. The ICC's adherence here to *Schwabacher*, in which the ICC was reversed for allowing minority shareholders' state law rights to survive, further indicates that the ICC did not purport to approve the availability of appraisal rights here.

Second, as to petitioners' argument that the statutory preemption can be waived by the parties, in *Schwabacher* the ICC was willing, and the railroads agreed, to allow dissenting shareholders to prosecute a state appraisal proceeding, thus waiving federal preemption if it was waivable. Indeed, in the merger agreement and before the ICC in that case the surviving railroad actually offered dissenting shareholders appraisal rights under Virginia law because the Michigan statute that permitted the merger at issue did not appear to give such appraisal rights to such dissenters. *Pere Marquette Railway Co. Merger*, 267 I.C.C. 207, 215-16, 247 (1947). Nonetheless, this Court reversed the ICC and, as noted above, held that the Interstate Commerce Act made satisfaction of the claims of dissenting stockholders a matter within the plenary and exclusive jurisdiction of the ICC. *Schwabacher*, 334 U.S. at 197-98.

Judicial decisions after *Schwabacher* have confirmed the plenary and exclusive jurisdiction of the ICC in connection with railroad mergers. In *Altman v. Central of Georgia Railway Co.*, 488 F.2d 1302 (D.C. Cir. 1973), the court followed *Schwabacher* and affirmed the dismissal of a state-law action to compel the payment of dividends on preferred stock. While the plaintiff's action was pending, the ICC had approved a railroad consolidation involving the defendant and had ruled that the preferred shareholders were paid the "just and reasonable" value of their stock. Relying upon *Schwabacher*, the court held that plaintiff's "claim of right to additional dividends derives solely from state law, and it does not survive the

final order of the Commission approving the consolidation. . . ." *Id.* at 1305.

Other courts have reached the same conclusion in similar cases. *Suffin v. Pennsylvania Railroad Co.*, 276 F. Supp. 549 (D. Del. 1967), *aff'd*, 396 F.2d 75 (3d Cir. 1968), *cert. denied*, 393 U.S. 1062 (1969); *see also Fried v. United States*, 212 F. Supp. 886 (S.D.N.Y. 1963); *Stott v. United States*, 166 F. Supp. 851 (S.D.N.Y. 1958); *Tsimenis v. New York Central Railroad Co.*, 34 A.D.2d 531, 309 N.Y.S.2d 22 (N.Y. App. Div. 1970).

2. The Allegedly Conflicting Decisions, Including The One Already Before This Court, Do Not Relate To ICC Determinations Concerning Shareholder Rights And Are Not Inconsistent With The Decision Below

Petitioners also claim that certiorari is appropriate on the ground that the decision of the Delaware Supreme Court is in conflict with decisions of the Courts of Appeals for the Fifth Circuit and the District of Columbia Circuit, one of which is already before this Court on certiorari. *See Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *cert. granted*, 54 U.S.L.W. 3630 (U.S. March 24, 1986) (Nos. 85-792, 85-793); *City of Palestine v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978). In fact, those cases have nothing to do with dissenting stockholders' rights to additional compensation after an ICC determination that merger terms are just and reasonable.

Unlike those cases, this case, like *Schwabacher*, involves an ICC determination concerning the reasonableness of merger terms, the existence of any surviving shareholder rights under state law, and the integrity of the capital structure of the merged railroad. On the issue of the self-executing preemption resulting from an ICC determination in these areas this Court has expressly opined in *Schwabacher*. Reviewing the legislative history of the Transportation Act of 1940 and the evolution of national transportation policy, the Court concluded that the

ICC was given "complete control of the capital structure to result from a merger." 334 U.S. at 195. Notwithstanding the willingness of the ICC and the parties to permit the parties to seek further benefits for shareholders by state court litigation, and the ICC's finding that the further payments sought by shareholders would not impair the carrier's ability to provide service, the Court held:

> If some greater amount than that specified in the agreement is to be allowed to any class of stockholders, it must either deplete the cash or inflate the liabilities or capital issues of the new company. It may be that in this case the merged company will be strong enough to carry this burden and still perform its public service. But that is not the sole purpose of the supervision provided by statute. . . . We think the Commission was in error in assuming that it did not have, or was at liberty to renounce or delegate, power finally to settle the amount of capital liabilities of the new company and the proportion or amount thereof which each class of stockholders should receive on account of its contributions to the new entity.

Id. at 198. The Court held that whatever rights appellants sought "must be founded on federal, not on state, law." *Id.*

Accordingly, said the Court:

> We therefore hold that no rights alleged to have been granted to dissenting stockholders by state law provision concerning liquidation survive the merger agreement approved by the requisite number of stockholders and approved by the Commission as just and reasonable.

Id. at 201. Thus, the ICC's determination of the fairness of merger terms is self-executing and precludes state law appraisal proceedings.

As the Chancery Court explained in its opinion below, the *City of Palestine* and *Brotherhood of Locomotive Engineers*

decisions do not implicate the *Schwabacher* holding that the required determination by the ICC as to the merger terms relating to shareholder rights and capital structure is protected by the congressional grant of exclusive and plenary jurisdiction from possible subsequent alteration in state appraisal proceedings.

In *City of Palestine* a railroad attempted to abrogate, in a merger proceeding, a contract obligating one of the merged carriers to maintain in Palestine a specified percentage of its employees in certain job classifications. Because that contract was "not germane to the success of" the approved merger, the Fifth Circuit held that its abrogation by the ICC was not immunized by the Interstate Commerce Act. 559 F.2d at 414. The "gratuitous destruction" of the contract (as the court put it) was outside the scope of the ICC's exclusive jurisdiction and the holding in *Schwabacher. Id.* at 414-15. Here, to the contrary, as the Interstate Commerce Act and *Schwabacher* make clear, a determination of the justness and reasonableness of the merger terms offered to shareholders is a necessary step in the ICC's approval and effectuation of a railroad merger.

Brotherhood of Locomotive Engineers involved disputes within labor unions concerning which local's members would operate the trains of a railroad given trackage rights by the ICC over the lines of Missouri Pacific Railroad Company in its merger with Union Pacific. The ICC ruled that its trackage right determination encompassed the "tenant" railroad's plans to use its own crews to operate its trains over the Missouri Pacific tracks. The ICC stated that its approval exempted the transactions from the requirements of all laws including any contrary provisions of the Railway Labor Act. The D.C. Circuit, by a divided panel, held that the ICC must supply a reasoned basis for the exercise of its authority to waive crew selection provisions of the Railway Labor Act. In a subsequent decision addressing the same dispute, the Eighth Circuit declined to follow the D.C. Circuit's holding. *Missouri Pacific Railroad Co. v. United Transportation Union*, 782 F.2d 107

(8th Cir. 1986) (*per curiam*), *petition for cert. filed*, 54 U.S.L.W. 3463 (U.S. Dec. 19, 1985) (No. 85-1054).

Although the Court granted certiorari to review the decision in *Locomotive Engineers*, that is not a reason to review the decision here. *Locomotive Engineers* presents a different issue and is not inconsistent with the decision below in this case, as the D.C. Circuit itself recognized in distinguishing *Schwabacher*:

> In *Schwabacher* . . . the insistence on further compensation by preferred stockholders of a merging company exceeded the compensation found just and reasonable in the ICC's approved plan of merger . . . .

Locomotive Engineers, 761 F.2d at 723 n.5. Further confirmation that *Locomotive Engineers* presents a different situation from this case is supplied by the fact that the D.C. Circuit itself has expressly held, in *Altman v. Central of Georgia Railway Co.*, 488 F.2d 1302 (D.C. Cir. 1973), discussed above, that *Schwabacher* precludes a lawsuit to enforce a shareholder's state law claim to an increased payment for his shares subsequent to ICC approval of a railroad merger.

In short, the issue here relative to the preemptive and self-executing effect of an ICC determination as to shareholder compensation and capital structure, in the absence of an express ICC invocation of an exemption from other laws, is different from the issue in the *Locomotive Engineers* and *City of Palestine* cases, those decisions are not inconsistent with the decision below here, and the pendency of certiorari in *Locomotive Engineers* provides no basis for granting certiorari in this case.

Whatever the result in *Locomotive Engineers*, the present case is governed by this Court's long-standing *Schwabacher* decision which, as shown, Congress has seen fit to leave unimpaired despite recodification of the pertinent statutory provisions. Apart from petitioners' failure to show any reason to overrule *Schwabacher*, the fact that Congress has left

Schwabacher undisturbed "lends powerful support to [its] continued viability." *See Square D Co.*, 54 U.S.L.W. at 4523. Here, as in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977), "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 28, 1986

APPENDICES

APPENDIX A

49 United States Code:

§ 11344. Consolidation, merger, and acquisition of control: general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b)(1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

* * *

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with public interest.

* * *

APPENDIX B

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30,000

UNION PACIFIC CORPORATION, PACIFIC RAIL SYSTEM, INC., AND UNION PACIFIC RAILROAD COMPANY-CONTROL-MISSOURI PACIFIC CORPORATION AND MISSOURI PACIFIC RAILROAD COMPANY

Finance Docket No. 30,000 (Sub-No. 1)

UNION PACIFIC CORPORATION, PACIFIC RAIL SYSTEM, INC., AND UNION PACIFIC RAILROAD COMPANY-CONTROL-THE WESTERN PACIFIC RAILROAD COMPANY

Decided: June 10, 1983

By decision served October 20, 1982, we approved the primary applications in these consolidated proceedings, subject to various terms and conditions. That decision has become administratively final.

Daniel A. Bruno has filed a pleading seeking reopening of the embraced Sub-No. 1 proceeding for the purpose of receiving further evidence regarding the fairness of the terms of the transaction to Western Pacific Railroad Company (WP) shareholders. Applicants have replied.

The reopening request asserts that the Commission should receive further evidence of the value of WP's land holdings as described in a prospectus dated May 2, 1983. The prospectus has been issued with respect to a shareholder meeting called for the purpose of approving the merger of WP into an indirectly wholly-owned subsidiary of Union Pacific Corporation (UP), as approved in our prior decision. UP and its subsidiaries now own about 87 percent of WP's outstanding class A common

stock, thus assuring approval of the merger and liquidation of the interests of minority shareholders. Mr. Bruno argues that statements in the prospectus regarding the proceeds from land sales since UP's tender offer for WP stock and the estimated value of WP's present land holdings are material new evidence warranting reopening of the proceeding and reconsideration of whether the transaction will be fair to the minority shareholders.

Petitions to reopen administratively final proceedings are governed by our rules of practice at 49 C.F.R. 1115.4. An administratively final proceeding will only be reopened upon a showing of material error, new evidence, or substantially changed circumstances. The allegations in Mr. Bruno's pleading are insufficient to warrant reopening of the proceeding. The land value allegations purportedly supported by the prospectus are not materially different from the allegations made by Mr. Bruno previously in his post-hearing brief. Those arguments were considered in our prior decision. Therefore, the request for reopening will be denied.

This action will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. The request for reopening is denied.

2. This decision shall be effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

Agatha L. Mergenovich
Secretary

[SEAL]

APPENDIX C

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March 29, 1985

The Honorable Carolyn Berger
Court of Chancery
Public Building
Wilmington, DE 19801

Re: *Bruno, et al. v. Western Pacific Railroad Co., Del. Ch., C. A. No. 7250*

Dear Vice-Chancellor Berger:

We are counsel for respondent Western Pacific Railroad Company. We have been notified by counsel for petitioner Bruno that the Court has set aside the week of June 24 and, if need be, the following week for the trial of this appraisal action. We therefore feel obliged to call to Your Honor's attention our client's position with regard to the applicability of *Schwabacher v. United States*, 334 U.S. 182 (1948), to this action. This position is set forth at page 5 of the Notice of Special Meeting of Shareholders and Proxy Statement, dated May 2, 1983, a copy of which is enclosed.

In *Schwabacher*, the United States Supreme Court, in construing the predecessors to Sections 11344 and 11346 of the Interstate Commerce Act, held that appraisal rights otherwise granted by state law are preempted in the case of acquisitions approved as just and reasonable by the ICC in accordance with applicable Federal law. The Supreme Court stated: "The jurisdiction of the [ICC] . . . is made plenary and exclusive and

independent of all other state or federal authority." 334 U.S. at 197. The ICC has approved the acquisition of Western Pacific by Union Pacific involved in this appraisal action and concluded that the $20 per share price, payable under the merger agreement between the two companies, was "just and reasonable" as a matter of federal law. *Union Pacific Corp.*, 366 I.C.C. 459 at 633-36 (1982), *aff'd sub nom., Southern Pacific Transportation Co. v. I.C.C.*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985).

As stated in the Proxy Statement, Union Pacific Corporation, Western Pacific's parent, has agreed that it will not object to the prosecution of this appraisal action on the basis of *Schwabacher*, and neither Union Pacific nor Western Pacific will therefore raise any such objection, although they will argue (as contemplated by the Proxy Statement) that the determination of the ICC is entitled to substantial weight by this Court should the action go forward. The Proxy Statement also cautioned, however, that there could be no assurance that a Delaware court would not, on its own initiative, determine that *Schwabacher* denies it jurisdiction over an appraisal proceeding commenced in connection with this merger. We therefore feel obligated to bring this matter to your attention prior to the commencement of trial.

Respectfully,

/s/ R. FRANKLIN BALOTTI
R. Franklin Balotti

Enclosure

cc: Joseph A. Rosenthal, Esq.
Vernon R. Proctor, Esq.
Register in Chancery

APPENDIX D

BEFORE THE

SUPREME COURT OF THE STATE OF DELAWARE

No. 323, 1985

DANIEL A. BRUNO and PHILIP R. HERZIG,

Petitioners Below,
Appellants,

—v.—

WESTERN PACIFIC RAILROAD COMPANY, a Delaware corporation, and UNION PACIFIC CORPORATION, a foreign corporation,

Respondents Below,
Appellees.

Supreme Court Courtroom
Courthouse
Dover, Delaware
Tuesday, February 25, 1986

BEFORE:

HON. ANDREW D. CHRISTIE, Chief Justice.
HON. JOHN J. MCNEILLY, Justice.
HON. ANDREW G. T. MOORE, II, Justice.

ARGUMENT

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APPEARANCES:

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and

LEONARD JOSEPH, ESQ. (New York Bar)
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for Respondents Below-Appellees.

* * *

MR. BERGER: May it please the Court, your Honors, this is an appeal from an order and judgment of the Chancery Court in which the Chancery Court dismissed reluctantly for lack of jurisdiction a statutory appraisal proceeding brought under Section 262 of 8 Delaware Code. This appraisal proceeding arose out of the merger between Western Pacific Railroad Company, a Delaware corporation, and a wholly-owned subsidiary of Union Pacific Corporation, a foreign corporation.

The Chancery Court believed that the Delaware appraisal statute was pre-empted by a federal statute, the Interstate Commerce Act, as that federal statute had been interpreted by a 1948 Supreme Court decision, Schwabacher against the United States. And, your Honors, the reluctance of the Chancery Court to dismiss the appraisal proceeding I think merits some discussion, and the reason the Court was reluctant was because of the particular circumstances in which the respondents, Union Pacific and Western Pacific, raised the issue of Schwabacher to the Chancery Court.

For over six years Western Pacific and Union Pacific had told the shareholders of Western Pacific that they would have an appraisal as far as they were concerned; that they would not object to an appraisal based upon Schwabacher; that shareholders could go into Delaware, assert their appraisal rights and Union Pacific would pay whatever value the Delaware Chancery Court decided was unfair.

JUSTICE MOORE: Didn't they also say that there was no guarantee that Schwabacher might not be applied?

MR. BERGER: That is correct, your Honor.

THE CHIEF JUSTICE: So they didn't say that, "We are going to have an appraisal." They said, "We wouldn't object to having one."

MR. BERGER: That's correct, your Honor. But what the Western Pacific shareholders assumed was that they were not going to have to face Western Pacific objecting to an appraisal, which indeed is what happened.

THE CHIEF JUSTICE: I thought that Western Pacific simply called it to the Court's attention and argued jurisdiction. They said they were not raising an objection; just assisting the Court in determining its jurisdiction.

MR. BERGER: Well, your Honor, I think that the Chancery Court's statements on those scores are germane to that. The Chancery Court said it would have proceeded with a trial of the appraisal proceeding but for the fact that Western Pacific and Union Pacific raised the issue. Indeed, the appraisal proceeding had been filed in July of 1983, right after the merger. The appraisal proceeding had gone on for almost two years without the respondents saying anything.

THE CHIEF JUSTICE: Are you suggesting there's little difference between objecting and raising a question as to jurisdiction?

MR. BERGER: I think in this case, your Honor, there is little difference, given what Western Pacific told shareholders and

the fact that they strenuously argued to the Chancery Court that the appraisal should be dismissed, contrary to what they had previously told Western Pacific shareholders, which was, "We are not going to object to the Chancery Court determining fair value."

JUSTICE MCNEILLY: But could jurisdiction be given if precedent said there was not jurisdiction in the Court?

MR. BERGER: No, your Honor, and we do not maintain that we can confer jurisdiction by agreement or that there is jurisdiction by estoppel. What we maintain is that the Interstate Commerce Act, the federal Act in question, does not pre-empt the Delaware appraisal statute and that the Chancery Court was incorrect in its decision.

THE CHIEF JUSTICE: So then you come right up against the case that you mentioned—

MR. BERGER: That is correct, your Honor.

* * *

APPENDIX E

Set forth below, pursuant to Rule 28.1, is a list of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of respondents The Western Pacific Railroad Company and Union Pacific Corporation:

Alameda Belt Line

Alton & Southern Railway Company

Arkansas & Memphis Railway Bridge and Terminal Company

Brownsville and Matamoros Bridge Company

Camas Prairie Railroad Company

Central California Traction Company

Champlin Marketing, Inc.

Chicago and Western Indiana Railroad Company

Denver Union Terminal Railway Company

Galveston, Houston and Henderson Railway Company

Great Southwest Railroad, Inc.

Houston Belt & Terminal Railway Company

Jefferson Southwestern Railroad Company

Kansas City Terminal Railway Company

Longview Switching Company

Oakland Terminal Railway

Portland Terminal Railroad Company

Portland Traction Company

Southern Illinois and Missouri Bridge Company

St. Joseph Terminal Railroad Company

Terminal Industrial Land Company

Terminal Railroad Association of St. Louis

Texas City Terminal Railway Company

The Belt Railway Company of Chicago
The Ogden Union Railway and Depot Company
The Pueblo Union Depot and Railway Company
Trailer Train Company
Union Pacific Resources Ltd.
Unita Development Company